Brownwood Sdn Bhd v Lembaga Hasil Dalam Negeri & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–9–01 OF 2019
AZIZAH NAWAWI J
5 FEBRUARY 2020

Administrative Law — Judicial review — Application for — Order of certiorari to quash first respondent's decision in rejecting applicant's application for refund of stamp duty — Whether application brought against proper party — Whether application fell within s 57(f)(i) of the Stamp Act 1949 — Whether application caught by proviso (a) and (b) to s 57 of the Stamp Act 1949 — Whether decision illegal and/or irrational

Revenue Law — Stamp duty — Refund — Applicant's application for refund of stamp duty rejected by first respondent — Whether application fell within s 57(f)(i) of the Stamp Act 1949 — Whether application caught by proviso (a) and (b) to s 57 of the Stamp Act 1949 — Stamp Act 1949 s 57

This was the applicant's application for judicial review seeking an order of certiorari to quash the first respondent's decision ('the decision') in rejecting the applicant's application for a refund of the stamp duty duly paid and a mandamus directing the first respondent to refund the sum of RM540,000 of stamp duty. The applicant had entered into a sale and purchase agreement ('SPA') with Menang Kuasa Sdn Bhd ('the vendor') in respect of a piece of land ('the land') for the sum of RM15m. Vide a letter, the Pejabat Daerah dan Tanah, Gombak had informed the parties that the state authority had approved the transfer of the land to the applicant. The applicant's solicitors had sent the executed memorandum of transfer ('Form 14A'), duly executed by the vendor to the applicant. The applicant had issued a banker's cheque in the name of Pemungut Duti Setem amounting to RM540,000 to the solicitors. Form 14A was submitted to the Deputy Collector of Stamp Duties and the stamp duties ad valorem was assessed at RM540,000 and the same amount was paid vide the stamp duty certificate. Later, another company Rasa Anggun Development Sdn Bhd ('Rasa Anggun') had entered a caveat on the land on the ground that Rasa Anggun had paid a deposit of RM3,267,000 for the land. However, Rasa Anggun withdrew its caveat and the land was transferred to the applicant. The applicant had paid RM2,650,000 to the solicitors towards the purchase price of the land. When the applicant made three title searches with the land office, the applicant found that the land had been transferred to Rasa Anggun by the vendor. The applicant then sued the vendor and the solicitors for fraud in the sale of the land. Subsequently a consent judgment was entered between the

parties. The applicant then requested the refund of the RM540,000 stamp duty paid to the first respondent. In response, the said application for a refund was rejected by the first respondent on the basis that the application did not fall within ss 21(7), 57–58 and 80(3) of the Stamp Act 1949 ('the Act'). Hence, this application by the applicant.

Held, dismissing the application with costs:

(1) A preliminary objection was raised by the respondents, that was, whether the application was brought against the proper party whose decision was being challenged. The applicant was seeking to review the decision made by the Deputy Collector of Stamp Duties under the Act. The first respondent herein was not the decision maker. Therefore, there was merit in the preliminary objection and the substantive application should be dismissed (see paras 14 & 18–19).

(2) Section 57(f)(i) of the Act envisaged a situation where the instrument was found to be 'absolutely void from the beginning', that was the instrument was 'void ab initio'. But in the present case, there was no issue of the Form 14A being 'void ab initio' as the applicant and the vendor had executed a valid transfer for the said land. It was just that the solicitors and/or the vendor had defrauded the applicant, and the applicant had sued them. From this suit, a consent judgment was entered. The consented term simply meant that the SPA was void and of no legal effect. It did not mean that the SPA was void from the beginning (void ab initio) but void from the date of the consent judgment. Therefore, the applicant's application for the refund did not fall within s 57(f)(i) of the Act as the instruments concerned, Form 14A, was not found to be 'absolutely void from the beginning' (see paras 32–35).

(3) The application for refund should be rejected premised on proviso (a) and (b) to s 57 of the Act. The application for refund was made on 31 May 2018 whereas the instrument, Form 14A, was executed by both the applicant and the vendor on 17 October 2012. Since the instrument was executed on 17 October 2012, the application should have been made within 12 months from 17 October 2012. Therefore, the application was clearly out of time and this court had no jurisdiction to extend time. This application must be rejected as it fell within proviso (b) to s 57 of the Act, in that there was already a legal proceeding that had been commenced, where the instrument, Form 14A, was offered in evidence. Accordingly, the application did not fall within s 57(f)(i) of the Act, and the application was caught by proviso (a) and (b) to s 57 of the Act. Therefore, the decision was not illegal nor irrational (see paras 36, 39 & 47–48).

[Bahasa Malaysia summary

Ini adalah permohonan pemohon untuk semakan kehakiman yang memohon perintah certiorari untuk membatalkan keputusan responden pertama ('keputusan') dalam menolak permohonan pemohon untuk pembayaran kembali duti setem yang telah dibayar dan mandamus yang mengarahkan responden pertama untuk membayar kembali jumlah duti setem sebanyak RM540,000. Pemohon telah membuat perjanjian jual beli ('SPA') dengan Menang Kuasa Sdn Bhd ('vendor') berkenaan sebidang tanah ('tanah') dengan jumlah RM15 juta. Melalui surat, Pejabat Daerah dan Tanah, Gombak telah memberitahu pihak-pihak bahawa pihak berkuasa negeri telah menyetujui pemindahan tanah tersebut kepada pemohon. Peguam pemohon telah menghantar memorandum pindah milik yang telah dilaksanakan ('Borang 14A'), yang telah dilaksanakan oleh vendor dengan sewajarnya kepada pemohon. Pemohon telah mengeluarkan cek bank dengan nama Pemungut Duti Setem berjumlah RM540,000 kepada peguam. Borang 14A telah diserahkan kepada Timbalan Pemungut Duti Setem dan duti setem ad valorem dinilai pada RM540,000 dan jumlah yang sama telah dibayar melalui sijil duti setem. Kemudian, satu lagi syarikat Rasa Anggun Development Sdn Bhd ('Rasa Anggun') telah memasuki kaveat di atas tanah dengan alasan bahawa Rasa Anggun telah membayar deposit sebanyak RM3,267,000 untuk tanah tersebut. Namun, Rasa Anggun menarik kembali kaveat dan tanah tersebut diserahkan kepada pemohon. Pemohon telah membayar RM2,650,000 kepada peguam untuk membayar harga tanah tersebut. Apabila pemohon membuat tiga carian hak milik dengan pejabat tanah, pemohon mendapati tanah tersebut telah dipindahkan ke Rasa Anggun oleh penjual. Pemohon kemudian menyaman penjual dan peguam untuk penipuan dalam penjualan tanah tersebut. Selepas itu, keputusan persetujuan dibuat antara kedua-dua pihak. Pemohon kemudian meminta pembayaran kembali duti setem RM540,000 yang dibayar kepada responden pertama. Sebagai jawapan, permohonan pembayaran kembali tersebut ditolak oleh responden pertama dengan alasan bahawa permohonan tersebut tidak termasuk dalam ss 21(7), 57–58 dan 80(3) Akta Setem 1949 ('Akta'). Oleh itu, permohonan ini oleh pemohon.

Diputuskan, menolak permohonan dengan kos:

(1) Bantahan awal dikemukakan oleh responden, iaitu, sama ada permohonan tersebut disampaikan terhadap pihak yang betul yang mana keputusannya dicabar. Pemohon memohon untuk menyemak semula keputusan yang dibuat oleh Timbalan Pemungut Duti Setem di bawah Akta. Responden pertama di sini bukanlah pembuat keputusan. Oleh itu, terdapat merit dalam bantahan awal dan permohonan substantif harus ditolak (lihat perenggan 14 & 18–19).

(2) Seksyen 57(f)(i) Akta menggambarkan situasi di mana instrumen

didapati 'benar-benar terbatal dari awal', iaitu instrumen itu adalah 'void ab initio'. Tetapi dalam kes ini, tidak ada isu bahawa Borang 14A menjadi 'void ab initio' kerana pemohon dan vendor telah melakukan pemindahan yang sah untuk tanah tersebut. Hanya peguam dan/atau vendor telah menipu pemohon, dan pemohon telah menyaman mereka. Dari guaman ini, keputusan persetujuan telah dibuat. Terma yang dipersetujui hanya bermaksud bahawa SPA tidak sah dan tidak mempunyai kesan undang-undang. Ini tidak bermaksud bahawa SPA tidak sah sejak awal (void ab initio) tetapi tidak sah dari tarikh penghakiman persetujuan. Oleh itu, permohonan pemohon untuk pembayaran kembali tidak termasuk dalam s 57(f)(i) Akta kerana instrumen yang berkaitan, Borang 14A, tidak didapati benar-benar terbatal dari awal' (lihat perenggan 32–35).

(3) Permohonan untuk pembayaran kembali harus ditolak berdasarkan peruntukan (a) dan (b) kepada s 57 Akta. Permohonan pembayaran kembali dibuat pada 31 Mei 2018 sedangkan instrumen, Borang 14A, telah dilaksanakan oleh pemohon dan vendor pada 17 Oktober 2012. Oleh kerana instrumen tersebut dilaksanakan pada 17 Oktober 2012, permohonan tersebut seharusnya telah dibuat dalam 12 bulan mulai 17 Oktober 2012. Oleh itu, permohonan itu jelas kehabisan waktu dan mahkamah ini tidak mempunyai bidang kuasa untuk melanjutkan masa. Permohonan ini harus ditolak kerana termasuk dalam peruntukan (b) kepada s 57 Akta, kerana sudah terdapat prosiding undang-undang yang telah dimulakan, di mana instrumen, Borang 14A, dijadikan sebagai keterangan. Dengan demikian, permohonan tidak termasuk dalam s 57(f)(i) Akta, dan permohonan itu tertangkap oleh peruntukan (a) dan (b) kepada s 57 Akta. Oleh itu, keputusan itu tidak menyalahi undang-undang atau tidak rasional (lihat perenggan 36, 39 & 47–48).]

Cases referred to

Booi Kim Lee v Menteri Sumber Manusia & Anor [1999] 3 MLJ 515, HC (refd)

Central Electricity Board v Commissioner of the Federal Capital & Anor; Insurance Company of North America – 3rd Party [1967] 2 MLJ 161 (refd)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)

DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW) (1982) 40 ALR 1, HC (refd)

Koperasi Serbaguna Kebangsaan Berhad v Pemungut Duti Setem, Wilayah Persekutuan, Kuala Lumpur [2004] 7 MLJ 482; [2003] CLJ 227, HC (refd)

Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94; [1997]1 CLJ 636, FC (refd)

Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor [1994] 1 MLJ 156, HC (refd)

T Ganeswaran lwn Suruhanjaya Polis Diraja Malaysia dan satu lagi [2005] 6

MLJ 97; [2005] 3 CLJ 302, CA (refd)
Terrance Byrne v The Revenue Commissioners [1935] IR 664 (folld)
V Sinnathamboo v Minister for Labour and Manpower [1981] 1 MLJ 251 (refd)

Legislation referred to

National Land Code Form 14A
Rules of Court 2012 O 53 r 2(4)
Stamp Act 1949 ss 2, 21(7), 57, 57(f)(i), 58, 80(3)
Stamp Duties Management Act 1891 [UK] s 10

Mohamed Ibrahim Mohamad (Ibrahim & Fuaadah) for the applicant.
Zul-Hasymi Mohamad (Legal Department, Inland Revenue Board of Malaysia) for the respondent.

Azizah Nawawi J:

APPLICATION

[1] This is the applicant's application for judicial review seeking an order of certiorari to quash the first respondent's decision dated 31 October 2018 ('decision') rejecting the applicant's application for a refund of the stamp duty duly paid and a mandamus directing the first respondent to refund the sum of RM540,000 of stamp duty.

[2] Having considered the application and the submission of the parties, this court had dismissed the applicant's application with costs.

THE SALIENT FACTS

[3] The applicant had entered into a sale and purchase agreement dated 23 August 2012 with Menang Kuasa Sdn Bhd ('vendor') in respect of a piece of land, Lot No 18059, Rawang, Selangor ('the land') for the sum of RM15m. The applicant was represented by a legal firm, Tetuan V Manickam & Partners ('solicitors').

[4] Vide a letter dated 15 October 2012, the Pejabat Daerah dan Tanah, Gombak had informed the parties that the state authority had approved the transfer of the said land to the applicant. On 8 November 2012, the solicitors had sent the executed memorandum of transfer ('Form 14A'), duly executed by the Vendor to the applicant. On 16 November 2012, the applicant had issued a bankers cheque in the name of *pemungut duti setem* amounting to RM540,000 to the solicitors.

[5] Form 14A was submitted to the Deputy Collector of Stamp Duties on 18 October 2012 and the stamp duties ad valorem was assessed at RM540,000 and the same amount was paid vide the stamp duty certificate on 20 November 2012.

[6] On 6 December 2012, another company Rasa Anggun Development Sdn Bhd ('Rasa Anggun') had entered a caveat on the said land on the ground that Rasa Anggun had paid a deposit of RM3,267,000 for the said land.

[7] However, when Rasa Anggun withdrew its caveat on 16 January 2013, the said land was transferred to the applicant on 16 January 2013. A search with the Land Office made by the applicant on 30 January 2013 also confirmed that the applicant is the registered owner of the said land.

[8] By 14 May 2013, the applicant had paid RM2,650,000 to the Solicitor, Tetuan V Manickam & Partners towards the purchase price of the said land. When the applicant made three title searches with the land office on 28 October 2013, 20 August 2014 and 18 February 2015, the applicant found that the said land had been transferred to Rasa Anggun by the vendor.

[9] The applicant then sued Menang Kuasa Sdn Bhd, the legal firm Tetuan V Manickam & Partners and all its partners for fraud in the sale of the said land in Suit No 22NCVC-380–07 of 2018. The Form 14A was filed as a document in the 'Ikatan Dokumen Bersama' to be used during the trial.

[10] Subsequently a consent judgment was entered between the parties on 12 February 2018 where the terms are as follows:

(a) that the SPA between the applicant and Menang Kuasa Sdn Bhd dated 23 August 2012 is void and of no legal effect;

(b) that the legal firm Tetuan V Manickam & Partners and its partners, Vickneswary a/p S Manickam and M Chelvanesan a/l S Manickam, are to refund the applicant the sum of RM2,650,000 with interest at 8%; and

(c) if Tetuan V Manickam & Partners and its partners, Vickneswary a/p S Manickam and M Chelvanesan a/l S Manickam, failed to refund the sum before 12 February 2018, they must pay an additional damage of RM1.5m.

[11] Vide a letter dated 31 May 2018, the applicant requested the refund of the RM540,000 stamp duty paid to the first respondent on 20 November 2012.

[12] In response, the said application for a refund was rejected by the first respondent vide an email dated 31 October 2018 on the basis that the application does not fall within ss 21(7), 57–58 and 80(3) of the Stamp Act 1949.

[13] Hence, the applicant filed this application to review and to quash the decision of the first respondent and a mandamus directing the first respondent to refund the said stamp duty in the sum of RM540,000.

THE FINDINGS OF THE COURT

[14] Before I deal with the merits of the application, I will now deal with the preliminary objection raised by the respondents, that is, whether the application is brought against the proper party whose decision is being challenged.

[15] On this issue, reference is made to O 53 r 2(4) of the Rules of Court 2012, which reads:

> Any person who is *adversely affected* by the *decision,* action or omission in relation to the exercise of the *public duty or function* shall be entitled to make the application.

[16] In the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 the House of Lords held as follows:

> The subject matter of every judicial review is a *decision* made by some person or (body of person) whom I shall call the *decision maker* or else a refusal by him to make a decision.

[17] In *T Ganeswaran lwn Suruhanjaya Polis Diraja Malaysia dan satu lagi* [2005] 6 MLJ 97; [2005] 3 CLJ 302, the Federal Court held the principle in judicial review to be as follows:

> Pendapat Mahkamah
>
> Sebelum mahkamah ini mempertimbangkan alasan-alasan rayuan yang dikemukakan peguam perayu, kami berpendapat adalah lebih sesuai jika dinyatakan di sini mengenai perinsip-perinsip yang digunapakai oleh mahkamah-mahkamah dalam pengedalian kes-kes 'judicial review'.
>
> Mengenai perkara ini kami ingin merujuk kepada House of Lords di dalam kes Chief Constable of *North Wales Police v Evans* [1982] 3 All ER 141 yang menyatakan:
>
> > Judicial review is not an appeal from a decision *but a review of the manner in which the decision was made,* and, therefore, the court is not entitled on an application for judicial review to consider whether the decision itself was fair and reasonable. (Emphasis added.)

[18] Judicial review is the review of the decision making process in which a decision has been made, and in this case the applicant is seeking to review the decision dated 31 October 2018, which was made by the Deputy Collector of Stamp Duties under the Stamp Act 1949 ('Act 378'). The 151 respondent herein is not the decision maker.

[19] Therefore, I am of the considered opinion that there is merit in the preliminary objection and the substantive application should be dismissed.

[20] On the merits of the application, I refer to the case of *Booi Kim Lee v Menteri Sumber Manusia & Anor* [1999] 3 MLJ 515, where Justice KC Vohrah had adopted Lord Diplock's classification of grounds of judicial review in the House of Lords case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. The three grounds described by Lord Diplock are:

(a) illegality;

(b) irrationality; and

(c) procedural impropriety.

[21] By illegality as a ground for judicial review, it means 'that the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it' and that '... the authority concerned has been guilty of an error of law in its action as for example, purporting to exercise a power which in law it does not possess'.

[22] By irrationality it means 'Wednesbury unreasonableness' and 'applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided upon could have arrived at it'.

[23] By procedural impropriety, it includes 'failure by an administrative tribunal to observe procedural rules that are expressly laid out ...' and 'duty to act fairly'.

[24] In the present case, the applicant is relying on the ground of illegality and irrationality, premised on s 57(f)(i) of Act 378.

Whether the decision is illegal and/or irrational

[25] The applicant takes the position that its application for the refund is premised on s 57(f)(i) of Act 378, which reads as follows:

57 Allowance for spoiled stamps

Subject to any rules which may be made under this Act and to the production of such evidence by statutory declaration or otherwise as the Collector may require, allowance shall be made by the Collector for stamps spoiled in the following cases —

...

(f) the stamp used for any of the following instruments —

(i) an instrument executed by any party thereto, but afterwards found to be absolutely void from the beginning;

Provided as follows:

(a) that the application for relief is made within twelve months after the stamp has been spoiled or become useless or in the case of an executed instrument after the date of the instrument, or, if it is not dated, within twelve months after the execution thereof by the person whom it was first or alone executed or within such further time as the Collector may prescribe in the case of any instrument sent abroad for execution or when from unavoidable circumstances any instrument for which another has been substituted cannot be produced within the said period;

(aa) that the application for relief is made within two months from the date the instrument of transfer is rejected by the Registrar of Titles; or

(b) that in the case of an executed instrument no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence, and that the instrument is given up to be cancelled.

[26] The applicant submits that s 57 allows the collector of stamp duties to allow refunds to a person in possession of a spoiled stamp. The word 'spoiled' is not defined in Act 378.

[27] With regard to statutory interpretation, in the case of *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94; [1997]1 CLJ 636, the Federal Court has held that:

The function of a Court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:

As a general rule a Court will adopt that construction of a statute which will give some effect to all of the words which it contains. Per Gibbs J in *Beckwith v R* [1976] 12 ALR 333, at p 337.

[28] In *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156, Justice Edgar Joseph JR SCJ stated that although

dictionaries are not to be taken as authoritative exponents of the meaning of the words used in the Acts of Parliament, it is a well-known rule that words should be taken to be used in their ordinary sense.

[29] In *Oxford Advanced Learner's Dictionary of Current English* (3rd Ed), the word 'spoiled' is defined to include, inter alia, '*make useless* or unsatisfactory'.

[30] This interpretation finds support in the case of *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 40 ALR 1, where the High Court of Australia (per Mason J) said as follows at p 21:

> Section 15(1) enables the Commissioner to allow a refund to a 'person possessed of any spoiled or unused stamps'. Section 15(2) enables the Governor in Council to prescribe, inter alia, the classes of cases in which the allowance may be made and the time within which the application for it is to be made. *In the absence of any statutory definition of 'spoiled', I think it should be understood as signifying not only stamps which are defaced, but also those that have become useless* as, for example, when the instrument to which they relate itself 'has failed in its intended operation and has become useless within the meaning of reg 30(7). These words then appropriately apply to a case in which the declarant fails to acquire the property on which the declaration of trust was intended to operate. Of it one can accurately say that it has failed in its intended operation and has become useless. The question arising under proviso (b) to reg 30 — what was the date when the stamp was spoiled? — may in some cases be difficult to determine, but that is not a matter that presently concerns us. (Emphasis added.)

[31] It is therefore the submission of the applicant that it is entitled for the refund of the stamp duty in the sum of RM540,000, as the stamp duty was executed in respect of Form 14A, the duly executed memorandum of transfer, but was subsequently found to be useless when the consent judgment was entered which rendered the SPA to be void. As such, the applicant submits that this case falls within s 57(f)(i) of Act 378, and the applicant is therefore entitled for a refund.

[32] However, s 57(f)(i) of Act 378 envisage a situation where the instrument is found to be 'absolutely void from the beginning', that is the instrument is 'void ab initio'. But in the present case, there is no issue of the Form 14A being 'void an initio' as the applicant and the vendor had executed a valid transfer for the said land. In fact, the title search conducted by the applicant clearly shows that as at 30 January 2013, the applicant was the registered owner of the said land (see exh 'MSI9'). This fact is affirmed by the applicant in para 17 of the affidavit in support, which reads:

> 17. Oleh kerana ketiadaan dokumen asal dalam simpanan Pemohon, saya berikrar bahawa saya telah membuat satu carian persendirian ke atas hartanah tersebut *pada*

30.01.2013 yang mengesahkan bahawa Pemohon adalah pemilik berdaftar hartanah tersebut.

[33] It is just that the solicitor and/or the vendor had defrauded the applicant, and the applicant had sued them. From this suit, the consent judgment dated 12 February 2018 (exh 'MSI14') was entered, and the term on the SPA of the said land reads:

(a) Perjanjian Jual Beli di antara Plaintif dengan Menang Kuasa Sdn Bhd bertarikh 23.8.2012 yang telah disediakan oleh Defendan Kedua, Defendan Ketiga dan Defendan Keempat *adalah batal dan tidak berkuatkuasa.* (Emphasis added.)

[34] The above consented term simply means that the SPA dated 23 August 2012 is void and of no legal effect. It does not mean that the SPA is void from the beginning (void ab initio), but void from the date of the consent judgment, that is effective 23 August 2012.

[35] Therefore, I am of the considered opinion that the applicant's application for the refund does not fall within s 57(f)(i) of Act 378 as the instruments concerned, Form 14A is not found to be 'absolutely void from the beginning'.

[36] Added to that, I am also of the considered opinion and I agree with the respondents that the application for refund should be rejected premised on proviso (a) and (b) to s 57 of Act 367.

[37] Proviso (a) to s 57 is on time frame to make the application for refund. This proviso (a) allows for relief if application for the same is made:

(a) within 12 months after the stamp becomes spoilt or become useless or in the case of an executed instrument after the date of the instrument; or

(b) if it is not dated within twelve months after the execution thereof by the person whom it was first or alone executed or within such further time as the collector may prescribe in the case of any instrument sent abroad for execution or when from unavoidable circumstances any instrument for which another has been substituted cannot be produced within the said period;

[38] In s 2 of Act 378, the word 'executed' and 'execution' used with reference to instruments not under seal, mean 'signed and signature'. Therefore, in the context of proviso (a) to s 57, the word 'executed' simply means that the instrument have been signed by both parties.

[39] In the present case, the application for refund was made on 31 May 2018 (exh 'MSI15'), whereas the instrument, Form 14A was executed by both the applicant and the vendor on 17 October 2012. Since the instrument was executed on 17 October 2012, the application should have been made within 12 months from 17 October 2012. Therefore, this application is clearly out of time and this court has no jurisdiction to extend time. In *Central Electricity Board v Commissioner of the Federal Capital & Anor; Insurance Company of North America – 3rd Party* [1967] 2 MLJ 161, the court held that:

> The Court has no inherent jurisdiction to extend time except where such power is expressly given to it under the provision of the law.

[40] In *V Sinnathamboo v Minister for Labour and Manpower* [1981] 1 MLJ 251, the court held as follows:

> *In the event, I was of the view that the one month time-limit prescribed under s 20(1) of the revised Act was a mandatory provision; and failure to comply was fatal to a workman who was not a member of a trade union.* In my view, that was the most natural interpretation of s 20(1) having regard to the clear words used by Parliament. I further agreed with Mr Das that Part VI of the Act was an extraordinary relief to a non-unionised workman. If it was the intention of Parliament to make the time-limit as a mere directory provision, then it would say so clearly. In the instant case, there was no justification for the court to import words into s 20. (Emphasis added)

[41] In *Koperasi Serbaguna Kebangsaan Berhad v Pemungut Duti Setem, Wilayah Persekutuan, Kuala Lumpur* [2004] 7 MLJ 482; [2003] CLJ 227, the court held that the time frame for refund under Act 378 is mandatory and if the application for refund was made outside the specified time frame, the same must be dismissed. The court held that:

> Furthermore, I am of the view that the plaintiff is not entitled for the refund because of the provisions on time limit for a repayment of the stamp duty as specified by s 58 of the Act. Section 58 provides as follows:
>
> 58 Allowance for misused stamps.
>
> > When any person has inadvertently used for an instrument liable to duty a stamp of greater value than was necessary, or has inadvertently used a stamp for an instrument not liable to any duty, the Collector may, on application made within twelve months after the date of the instrument, or, if it is not dated, within twelve months after the execution thereof by the person whom it was first or alone executed, and upon the instrument, if liable to duty, being stamped with the proper duty cancel and allow as spoiled the stamp so misused.
>
> The said provision does allow an application for repayment of stamp duty where a person has '... inadvertently used a stamp for an instrument not liable to any duty ...'. *But it must be made within 12 months after the date of the instrument. In our present case, the plaintiff paid the stamp duty of RM30,000 on 10 October, 1995 and*

the application for repayment was made on 6 August, 1997. Clearly, it surpassed the time limit as specified by s 58 of the Act. (Emphasis added.)

[42] The English case of *Terrance Byrne v The Revenue Commissioners* [1935] IR 664 is also instructive. In this case, the question turns upon the meaning of the words 'application must be made within two years after *the date of the instrument*' in s 10 of the Stamp Duties Management Act 1891 (pari materia with s 58 of Act 378) regarding refund of stamp duty paid inadvertently. The facts in this case is that the instrument was dated 30 January 1932, but was retained as an escrow pending payment of the purchase price, which was paid on 19 May 1932. The instrument was then stamped on 31 May 1932. In fact, the plaintiffs were exempted from payment of stamp duties, and upon discovering this, made an application for refund of the stamp duty on 25 April 1934. The claim was refused by the Revenue on the ground that it was not made within the specified two years period from the date of the instrument. The plaintiffs argued that the correct construction of the words 'date of the instrument' is the 'date the instrument becomes operative', that is 19 May 1932. However Johnson J held at p 670:

> The date of the instrument was January 30th, 1932 and I have no power to extend a statutory date of that kind by giving the section a forced and fanciful construction.

[43] The last issue raised by the respondents is that the application should be dismissed as the application is caught by proviso (b) to s 57 of Act 378. Proviso (b) is applicable in the following circumstances:

(i) there was an executed instrument; and

(ii) there was no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence; and

(iii) the instrument is given up to be cancelled.

[44] There is no issue on (i) and (iii), that there was an executed instrument which is given up to be cancelled under the terms of the consent judgment dated 23 August 2012.

[45] The only issue here is whether there was any legal proceeding that has been commenced in which the instrument could or would have been given or offered in evidence. In the present case, there was a legal proceeding that has been commenced, culminating in the consent judgment dated 23 August 2012 (Suit No 22NCVC-380–07 of 2015). This suit is against the vendor and the solicitors handling the SPA of the said land for the return of the sum of RM2,650,000 duly paid under the SPA and damages in the sum of RM1.5m.

[46] On the issue of whether the instrument *could* or *would have been* given

or offered in evidence in the said suit, this fact had been admitted by the applicant in para (5) of the affidavit affirmed by Mohamad Suffian bin Ismail on 17 April 2019, which reads:

> Saya juga menegaskan bahawa adalah tidak munasabah untuk menyatakan bahawa tempoh 12 bulan sebagaimana diperuntukkan dalam Proviso Seksyen 57 Akta Setem mesti dikira daripada tarikh perjanjian dalam kes ini walaupun seksyen ini membenarkan ianya dikira daripada tarikh setem menjadi rosak atau tidak berguna. *Lebih-lebih lagi dalam kes ini, dokumen yang disetemkan tersebut telah ditawarkan menjadi salah satu bukti untuk dikemukakan dalam prosiding Mahkamah Yang Mulia ini.*
>
> Difampirkan sesalinan lkatan Dokumen Bersama yang telah difailkan di Mahkamah Tinggi Shah Alam melalui guaman no: 22NCVC-380-07/2018 yang ditandakan sebagai eksibit 'MSI-1'. (Emphasis added.)

[47] Therefore, I am of the considered opinion that this application must be rejected as it falls within proviso (b) to s 57, in that there is already a legal proceeding that has been commenced in Suit 22NCVC-380–07 of 2018, where the instrument, Form 14A was offered in evidence. As to whether the suit culminates in a consent judgment is irrelevant, as proviso (b) to s 57 merely requires the filing of a suit and the use of the instrument for the purpose of the suit.

CONCLUSION

[48] Premised on the reasons enumerated above, I find that the application does not fall within s 57(f)(i) of Act 378, and that the application is caught by proviso (a) and (b) to s 57. Therefore, I am of the considered opinion that the decision is not illegal nor irrational and the application is hereby dismissed with costs.

Application dismissed with costs.

Reported by Ahmad Ismail Illman Mohd Razali